Supreme Court, U.S.
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No. 87-1306

In the Supreme Court of the United States

OCTOBER TERM, 1987

In Re:

PROGRESSIVE FARMERS ASSOCIATION,
Debtor-Bankrupt.

SOUTH CENTRAL ENTERPRISES, INC., EDWIN M. LIPSCOMB FARMS, INC., CALEB LIPSCOMB and ELLEN LIPSCOMB,
Petitioners,

vs.

RICHARD FARRINGTON, TRUSTEE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(AS STATED BY PETITIONERS)

I. Where the trial judge rules that an issue (the affirmative defense of waiver and estoppel) is not before the court for consideration and is not to be developed by the parties by the introduction of evidence, have the Petitioners been denied due process of law, guaranteed by the Fifth Amendment of the United States Constitution, when the Appellate Court relies on that very issue in finding against Petitioners?

II. Where, on first appellate review of a bankruptcy judge's decision, the Federal District Judge vacates and remands the decision and further sets forth the legal conclusions which must necessarily follow upon the finding of certain facts, may another Federal District Judge, on the second appellate review, refuse to follow the "law of the case" established by the Federal District Judge during the first appellate review?

PARTIES TO THE PROCEEDINGS

Petitioners South Central Enterprises, Edwin M. Lipscomb Farms, Inc., Caleb and Ellen Lipscomb were claimants-appellants below.

Respondent Richard Farrington, Trustee for the bankrupt, was the appellee below.

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STATEMENT OF THE CASE

The nature of the issues presented for review requires a comprehensive statement of the facts and procedural history of the case. Against such a background, the Court will quickly see that the case presents no issue worthy of the Court's time and attention.

Petitioners are "Aggieville", three separate family agricultural businesses owned by Petitioners and operated

in the three Missouri towns of Springfield, Liberal and Monett. Aggieville consists of a farm supply store, a grain elevator, a bulk fertilizer plant, and associated retail agricultural enterprises. Aggieville was owned in part, and operated in full, by Petitioner Caleb Lipscomb.

In December, 1975, Aggieville contracted to sell its realty and personalty to bankrupt "PFA", now represented by Respondent Richard Farrington, its Trustee. PFA is a shorthand term for Progressive Farmers Association.

PFA acquired Aggieville, in a "package deal", under a group of three separate contracts executed in December, 1975, by which Aggieville agreed to transfer all its personalty and realty, free and clear of liens, to PFA. PFA executed separate notes to the respective Aggieville interests. PFA was to take title, then execute deeds of trust on the realty and grant security interests in the personalty to Aggieville, to secure the notes. PFA paid $60,000 down and was to pay the remaining $840,000 in monthly payments, all due on the first of each month, with a five day grace period.

The contracts required Aggieville to furnish PFA with good and marketable title to the realty. If PFA objected to the title, and Aggieville was unable or unwilling to cure the objections, the contracts could be annulled at PFA's option.

Aggieville tendered the abstracts in January, 1976, but PFA objected to serious defects in the title tendered. Aggieville said that it could clear and convey good title when a pending lawsuit between Caleb Lipscomb and one of his sisters was resolved. PFA agreed to wait, and the parties further agreed that since it was "all one deal", none of the deeds to *any* of the real estate would be recorded until all of the deeds could be recorded.

Almost a year later, in December of 1976, PFA learned that the lawsuit had been dismissed, and soon again complained about the defect. Aggieville continued to be unable or unwilling to cure the defect and convey good title.

During 1976 and 1977, PFA's note payments to Aggieville were consistently made and accepted late. As Judge Jones soon noted, in the initial Bankruptcy proceedings, every payment was late, every month, on every note. Some were 28-30 days late. Still, "Sellers never declared a default of any of the notes for late payments until May 9, 1977 . . . ," per Judge Jones (Pet.for Cert.,A3).

Also during 1976, PFA began to experience financial difficulties. Lipscomb had to personally guarantee payment to Aggieville's suppliers. Rumors of PFA's impending bankruptcy were commonplace.

Lipscomb reacted to PFA's problems by taking even more control of Aggieville's operations than he had already as the manager. In January of 1977, he demanded, and received from PFA's Board, control and checkbook authority over all Aggieville funds and bank accounts, which were separate from PFA's.

Lipscomb admitted that *he* then controlled the time of payment on the Aggieville notes (Pet.for Cert.,A62). He elected to bring the trade accounts payable current rather than use the funds to timely pay the note payments to himself. Lipscomb was in exclusive physical possession of all Aggieville assets at all locations. He controlled Aggieville's checkbooks, its bank accounts, its employees, its purchases, its sales prices and policies, and its property. All the Aggieville realty was still titled to Aggieville. Neither the realty nor personalty had been cleared of the substantial liens of Aggieville's lenders.

Financial pressure on PFA increased in 1977. On May 9, 1977, three days after the grace period on the May payments had passed, Lipscomb accelerated and declared the notes and security agreements in default by delivering PFA a "Notice", reproduced from the Record at App. hereto, p. A8. The Notice cites only "default in payment under the promissory notes." A few days later, PFA filed for bankruptcy.

The first Bankruptcy Court, Judge Jack Jones, held immediate hearings to identify and protect PFA's assets. He appointed Richard Farrington, Respondent here, as Receiver (later Trustee). Aggieville filed and later amended a reclamation petition specifically asserting it was entitled to all personalty under the security agreements, by reason of ". . . default in said promissory notes." (Reprinted at App. hereto, pp. A5-8, from the Record on Appeal, pp. 26-27) Respondent Trustee promptly elected by counterclaim to rescind the executory PFA-Aggieville contracts on the basis of Aggieville's failure to deliver title.

Judge Jones tried the case in September, 1977, on the issues of whether PFA was in default on the note payments, and the Trustee's claim for rescission. On a strong body of Missouri law, the court ruled that PFA was not in default on the May, 1977, note payments, since Aggieville's prior uncomplaining acceptance of the late payments resulted in a practical modification of the contract payment dates by extension thereof, and that as extended, the payments were not in default on May 9. The court also found the Trustee entitled to rescind the "package deal" sale since Aggieville could not convey good title. The Bankruptcy Court then thoughtfully

analyzed the flow of dollars and the equities, and declared the parties would be restored to status quo upon payment by Aggieville of $458,825.10 to the Trustee (Pet.for Cert.,A25), and return of all the property to Aggieville.

Aggieville appealed to the first District Court, the Honorable William R. Collinson, who: noted the "package deal"; held that all questions germane to Aggieville's rights to possession were before the court; determined that Missouri law governed; and specifically affirmed the finding that PFA was not in default under Missouri law, due to the extended payment dates (Pet.for Cert.,A32-34).

The first District Judge raised, sua sponte, the issue of PFA's insolvency as a default which might entitle Aggieville to foreclose. Judge Collinson then vacated the opinion below and remanded with directions that the Bankruptcy Court make findings, under a solvency test prescribed by the District Court: (1) as to PFA's insolvency as of the foreclosure date, and (2) also whether "any of the [other] events constituting default under the security agreements took place on or before May 9, 1977" (Pet.for Cert.,A35). The court held that if PFA was "in default under the security agreements," Aggieville was entitled to foreclose and ". . . the Trustee's counterclaim for rescission must be denied." (Pet.for Cert.,A35).

Prior to the District Judge's order of remand, the issue of any default other than nonpayment had never been pled, argued, briefed, designated for review, or even mentioned in testimony.

The Trustee promptly filed for rehearing, raising the arguments that: (1) under Missouri law, when Aggieville declared default and foreclosed for the sole stated reason of late payment on the promissory notes, it waived all other known grounds of default then extant, and (2) under Missouri law, the first party to materially breach an executory bilateral contract cannot thereafter demand performance of the same contract by the other party. The Trustee argued that because Aggieville was in prior default, as it could not deliver the title, Aggieville could not enforce the default provisions of the security agreements, *whatever* the specific nature of the post hoc declaration of default might be.

Judge Collinson overruled the Trustee's motion for reconsideration. On remand to the Bankruptcy Court, Judge Joel Pelofsky succeeded Judge Jones, who had died in the interim.

Aggieville refused Judge Pelofsky's offer of leave to amend its amended reclamation petition, which pled only default in timely note payments. Aggieville insisted the Order of Remand strictly governed, that no other evidence or issues could be heard except on the "events of default," including insolvency. This paper posture allowed Aggieville to prevent the Trustee from pleading the affirmative defenses of waiver and estoppel. The Trustee filed an amended answer and raised the issues as best he could. As noted in the trial transcript excerpt at Pet.for Cert.,A127-128, the Trustee constantly tried to assert the waiver and estoppel issues, but Judge Pelofsky declined to consider them due to the remand order. Nor did he address those issues.

Judge Pelofsky ruled, after extended hearings, that no other event of default had occurred, that PFA was

solvent under the test mandated by the first District Court, and that Aggieville had declared default based on nonpayment ". . . and upon no other ground." (Pet.for Cert.,A61). "The evidence shows that Lipscomb relied upon nonpayment. The evidence of conduct does not support another conclusion." (Pet.for Cert.,A63).

Judge Pelofsky then reinstated the original judgment in favor of the Trustee. Aggieville appealed, this time to Judge Russell Clark, the second District Judge, who found that Judge Pelofsky had improperly relied on the equity test of insolvency as "suggested" by the first District Judge (Pet.for Cert.,A99). The court also held that there was no substantial evidence to support Judge Pelofsky's finding of PFA's solvency, but that:

> "Notwithstanding, . . . this court finds that appellants are estopped from declaring forfeiture on grounds of insolvency. Because Judge Collinson introduced the new issue of the debtor's insolvency into the case, Judge Pelofsky was free to consider the Trustee's defense of waiver and estoppel which was not considered by Judge Collinson." (citations omitted)

(Pet.for Cert.,A103).

The second District Court also upheld

> ". . . Judge Jones' finding, which was affirmed by Judge Collinson, and found by Judge Pelofsky that the bankrupt had a right to rescind the contract for Lipscomb's failure to transfer good and marketable title . . . [in this] . . . 'package deal' for all of the realty and personalty involved . . . . Under Missouri law . . . a party to a contract cannot seek from the

> other party benefits where he is the first to violate the contract (many Missouri cases omitted). This court finds that Aggieville materially breached its contract with the bankrupt and is barred from claiming benefits under the contract for a later breach by the bankrupt, whether the breach consisted of nonpayment or insolvency."

(Pet.for Cert.,A106).

Aggieville appealed to the Eighth Circuit. Their primary reliance below was on jurisdictional issues not present here, and on law of the case doctrine, with Petitioner asserting that Judge Clark was bound entirely by Judge Collinson's ruling of an issue not pled, presented, briefed, or argued. Aggieville asserted Judge Clark had no authority to consider the Trustee's defenses, saying they had been silently overruled "by implication."

The Circuit Court below specifically noted and rejected Aggieville's argument that the law of the case doctrine required Judge Clark to enter judgment for Aggieville once he had found PFA insolvent. The Circuit Court sketched the doctrine as ". . . a rule of practice rather than a command to the courts," requiring that a prior appellate decision must be followed unless there is new evidence ". . . or the decision is clearly erroneous and works manifest injustice." (Pet.for Cert., A117).

The court held that law of the case doctrine

> ". . . has no application in this case. Judge Collinson interjected the question of Progressive's insolvency vel non on his own motion. He said nothing about the doctrine of waiver of grounds for forfeiture or foreclosure. Given the tortuous (and inexcusably

> prolonged) procedural path this case has traversed, we are loath to read into Judge Collinson's order more than appears there."

(Pet.for Cert.,A117-118).

The Circuit Court then reviewed the evidence concerning the waiver issue, noting the strong body of Missouri law, and agreeing with Judge Clark that:

> "Substantial evidence exists to support the finding that appellants relied solely on a default in payment in declaring a forfeiture. . . . [w]e cannot say that the bankruptcy court's finding that appellants relied solely on default in payment in declaring forfeiture is clearly erroneous."

(Pet.for Cert.,A119).

The Circuit Court concluded that Missouri law prohibited Aggieville from asserting forfeiture on any ground other than nonpayment, and turned to the issue of whether Aggieville could claim the payments were late. First discussing the controlling Missouri cases, the Court approved the four prior holdings that Aggieville had waived its right to prompt payments, consequently there was no payment default entitling Aggieville to foreclose (Pet.for Cert.,A121-122).

The Eighth Circuit did not comment on Judge Clark's alternate holding for the Trustee on the "first party to breach" rule. The Circuit Court did review the facts and law on the rescission issue, affirming Judges Clark, Pelofsky and Jones in holding the Trustee entitled to rescission.

Aggieville filed for rehearing, and for the first time designated the due process issue it now asserts here. The Motion for Rehearing, and for Rehearing en banc, was overruled.

SUMMARY OF ARGUMENT

I. The Court's Articulated General Policy Considerations Preclude Review

Measured by this Court's Rule 17 yardstick, this highly fact specific case has none of the characteristics which move the Court to grant certiorari.

If reviewed, the issues presented would require review of a fact-heavy record in a case with a "tortuous" procedural history, per the Court of Appeals, Pet.for Cert., A117. Yet this Court does not grant certiorari to review evidence and discuss specific facts, nor does it sit to render judgments of interest only to the litigants. The Court's scant resources are better spent on cases involving large issues of nationwide impact and concern. This case is just a run-of-the-mill rescission suit, involving only Missouri law. No significant constitutional law issue is even raised; and if it were, the Court would not reach it. Finally, the judgment below is correct on the merits and on the law, as concurrently found and applied by the several federal courts below.

II. Due Process Considerations - General

No due process issue was properly raised below, nor did the Circuit Court rule the point, which argues against review here. Even if there were a significant due process issue, this Court would not reach it because the judgment below is independently supported by two independent bodies of state law, concurrently interpreted and applied to concurrent findings of fact.

III. Due Process Considerations - Specific

Petitioner Aggieville received all the process due it, namely notice and an opportunity to be heard. It fully utilized its opportunities below. Aggieville created at trial, for tactical reasons, the situation of which it now complains. It should not ask this Court to repair its tactical error.

IV. Law of the Case Considerations

Petitioner's "law of the case" issue presents no independent grounds of jurisdiction, and must fall together with the due process issue. If applied as requested by Aggieville, the doctrine would require this Court to hold that two wrongs make a right! The doctrine, which is only a rule of practice, was properly applied by the Circuit Court below to prevent error and manifest injustice, in a manner fully consistent with this Court's recent controlling decision in *Arizona v. California*, 460 U.S. 605 (1983). Petitioner does not even argue to the contrary.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Court's Articulated General Policy Considerations Preclude Review

The present petition does not merit certiorari because: (1) It alleges no conflict between two Circuit Courts of Appeal; (2) it alleges no conflict between a Circuit Court of Appeal and a State's highest court, (3) the case is not "special or important" to anyone except the parties, (4) there is no conflict with this Court's controlling precedent, and (5) there is no significant unsettled question. Petitioner's one-paragraph argument, that the Circuit Court below sanctioned such a departure from the usual and accepted course of judicial proceedings as to require certiorari review, is without merit.

This Court reviews judgments. *California v. Rooney*, 483 U.S. ..... (1987). It does not review the reasons given therefor, particular statements in opinions, or conflicts in the evidence. The judgment below is unassailably correct on the merits and on the law.

The several Courts below, relying on a well established and unexceptionable body of Missouri law, would rightly not permit Aggieville to (1) "sell" its property to PFA, (2) get paid for it, (3) fail to transfer the realty to PFA, or clear the property of liens, and (4) then retake by foreclosure or forfeiture property worth far more than when it was "sold." Nor should this Court. No argument can be made to justify a holding which would allow Petitioner Aggieville to embrace the sweet provisions of the contract, but reject the bitter.

II. Due Process Considerations - General

No constitutional law issue of widespread importance is even properly presented for review. Petitioner's only constitutional argument here is a one-paragraph due-process argument, citing only two cases, without the benefit of any analysis or development (Pet.for Cert.,p.7).

The Eighth Circuit's rules require a statement of the issues, as does F.R.App.P. 28(a). We have reproduced at App. hereto, pp. A1-4, pages ix and x of Petitioner's brief to the Eighth Circuit. No due process issue similar to the Question Presented For Review here was isolated for the court below. Petitioner did make a bare-bones due process argument in the course of its brief, but the Eighth Circuit did not address the point. Petitioner's Motion For Rehearing, and for Rehearing en banc, was the first time Petitioner isolated and framed the issue for review in its present due process configuration.

It is well settled that this Court will ordinarily refuse to review an issue not precisely raised or fully addressed below.

> "We do not discuss Petitioner's contentions which he failed to assign as error below."

Sonzinsky v. U.S., 300 U.S. 506, 514 (1937).

The Eighth Circuit alternatively may have felt no need to reach the issue, assuming they felt it was raised, for they were easily able to dispose of the case on non-constitutional grounds. Whatever the reason, the court below did not rule the point, and all such questions should be decided in the first instance by the Court of Appeals. *Escambia County v. McMillan*, 466 U.S. 48 (1984).

This Court has consistently held:

> ". . . [i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin,* 323 U.S. 101, 105 (1944); *Jean v. Nelson,* 472 U.S. 846 (1985).

In *Ashwander v. TVA,* 297 U.S. 288, 347 (1936):

> ". . . [n]ormally the Court will not decide a constitutional question if there is some other ground on which to dispose of the case."

And see *Escambia County v. McMillan,* 466 U.S. 48, 51 (1984).

Two prongs of this principle apply here. As to the law, the judgment below is unassailably supported by not one, but two independent State law grounds, concurrently construed by at least two courts below, thus making the claimed constitutional issues unreachable.

Just this term, in *Virginia v. Am.Booksellers' Ass'n.,* 484 U.S. ..... (1988), the Court held:

> "This Court rarely reviews a construction of state law agreed upon by the two lower federal courts. *Brockett v. Spokane Arcade, Inc.,* 472 U.S. 491, 499-500 (1985)."

The Eighth Circuit's decision is clearly bottomed on deeply rooted principles of Missouri law. They said:

> "The remedy of forfeiture under Missouri law is a harsh remedy and is not favored by the courts, . . . and both the letter and spirit of the law must be complied with before a court will permit forfeiture. * * * Under Missouri law the expression of a specific ground

in the notice of forfeiture or declaration of default precludes the later assertion of additional grounds."

(Pet.for Cert.,A118-119).

The Eighth Circuit reviewed and approved the established unremarkable Missouri law governing rescission, and it cited and relied on the established Missouri law concerning waiver of the right to insist on timely note payments (Pet.for Cert.,A120-123).

Because the Eighth Circuit's judgment is fully supported on its face by the independent state law grounds set forth therein, this Court would not reach any constitutional issues. Indeed, even if the Eighth Circuit had expressly ruled the constitutional issues, this Court would not reach or review the point if the state law grounds were also present. *Ashwander v. TVA*, supra. For stronger reason, such review should be denied here.

In addition to the State law grounds of waiver articulated by the Eighth Circuit, another group of independent State law principles has been applied to support the judgment. Both Bankruptcy Judge Pelofsky and District Judge Clark noted the ancient principle of Missouri contract law that a party who is in prior material breach of a bilateral contract cannot thereafter insist on performance by the other party (Judge Pelofsky, see Pet.for Cert.,A81) (Judge Cark, see A108).

While the Eighth Circuit did not find it necessary to reach this point, nevertheless this ground is still available to the Respondent to urge in support of the judgment, per *U.S. v. New York Telephone Co.*, 434 U.S. 159 (1977). It is therefore also available for consideration in determining whether certiorari should be granted.

The Court should also refuse to grant the writ because, as to the facts:

> ". . . [a] seasoned and wise rule of the Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error,"

per *Comstock v. Institutional Investors*, 335 U.S. 211, 214 (1948). The case at bar is even stronger, since at least three, and sometimes four, Missouri-trained Bankruptcy and District Court judges have passed on the essential facts and applied Missouri law thereto. *Bishop v. Wood*, 426 U.S. 341 (1976).

The essential facts necessary to support the judgment below are:

> (1) Aggieville declared default based on late payments only (so held by Judge Pelofsky, affirmed by Judge Clark, affirmed by the Eighth Circuit).
>
> (2) PFA was not in default under the extended note payment date (as held by *every* court below).
>
> (3) Aggieville was in prior material breach when it attempted to declare default (Judges Jones, Pelofsky and Clark so held, affirmed by the Eighth Circuit).

Review by this Court would thus simply add another fact-heavy review to the ones already conducted below, in a case without nationwide impact, resulting in a waste of the Court's limited resources. "We do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnson*, 268 U.S. 220, 227 (1925).

III. Due Process Considerations - Specific

The Court should deny the petition because the Petitioner Aggieville has created, for trial and tactical reasons, the condition about which it now complains. The entire thrust of Aggieville's petition for review is a denial of the opportunity to litigate the waiver issue in Judge Pelofsky's Bankruptcy Court, when one of Judge Pelofsky's factual findings was relied upon by Judge Clark on review.

Aggieville's argument is unsound. The first District Court advised Aggieville in its remand order that Aggieville's reclamation petition brought before the Court "all questions" germane to Aggieville's right of possession, including defenses which the Trustee might lawfully interpose, relying on a quoted Eighth Circuit decision (Pet. for Cert.,A31-32).

The Trustee, immediately upon receipt of Judge Collinson's remand order, filed a motion for reconsideration and set forth precisely and exactly the same theories of law upon which he has since relied throughout.

Following remand, Judge Pelofsky offered Aggieville the opportunity to amend its pleadings so as to assert default on other grounds besides nonpayment, but Aggieville refused to amend, and in fact dismissed its reclamation petition in order to prevent the Trustee from pleading the affirmative defenses of waiver and estoppel.

There can be no denying that Aggieville had notice of, and the opportunity to litigate all legal and factual issues, which the Trustee promptly presented. Indeed, Aggieville presented briefing and argument on the issues to Judge Clark and the Eighth Circuit. Aggieville repeatedly re-

quested that Judge Pelofsky limit the scope of the hearings. Having done so, they can hardly now complain of a lost opportunity to litigate!

IV. Law of the Case Considerations

Petitioner asserts that the law of the case doctrine should have been applied to require the second District Judge to perpetuate the error of the first. Petitioner asks this Court to hold that two wrongs make a right! The legal system exists to correct errors, not perpetuate them.

How can Petitioner ask this Court to adopt a rule that would elevate an offhand ruling on a completely undeveloped issue above a decision made after trial, briefing, argument, and consideration of all pertinent facts and legal theories? Such a rule would be absurd.

Nor does Petitioner explain why the "clearly erroneous" exception to law of the case doctrine does not apply here. Petitioner has made no attempt to establish the "rightness" of the first District Court's decision, because no such principled argument can be made!

The doctrine does not apply here since Judge Collinson's remand order was not a final judgment. See *U.S. v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950).

Even if Petitioner were correct that Judge Collinson's decision bound Judge Clark, Petitioner doesn't explain how it could bind the Eighth Circuit. Surely Petitioner cannot believe that the first District Court's erroneous declaration of an issue is binding on the appellate court, for such is not the law. *Zeckendorf v. Steinfeld*, 225 U.S. 445 (1912).

The Circuit Court below held that the law of the case doctrine does not apply in this case, for the reasons: (1) it does not apply when the prior decision is "clearly erroneous and works manifest injustice"; (2) it is a rule of practice, not a command, and (3) Judge Collinson's decision did not consider or rule the Trustee's waiver and estoppel defenses, so Judge Clark was free to do so (Pet.for Cert.,A117).

The Circuit Court was correct across the board. Its judgment is fully consistent with this Court's precedent in *Arizona v. California,* 460 U.S. 605, 618 (1983), that:

> ". . . law of the case is an amorphous concept. . . . Law of the case directs a court's discretion, it does not limit the tribunal's power."

And in footnote 8 the Court stated:

> "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." Id.

Petitioners understandably make no attempt to show how the Circuit decision is at variance with *Arizona v. California.* Nor do they even try to reconcile their Petition for Certiorari with this Court's holding above. No wonder they do not even cite the case!

Law of the case doctrine, applied to district courts of co-ordinate jurisdiction, is a rule of practice and no more. Supervision of such matters is best left to the appropriate circuit court below. Here, the Eighth Circuit properly and tactfully ruled, in accord with *Arizona v. California,* supra, that the doctrine is not binding since its application

would result in clear error or manifest injustice, as both Judge Clark and the Eighth Circuit felt it already had. Every federal circuit applies a similar rule.

Law of the case issues, by their amorphous nature, cannot be resolved absent a full dress review of the facts and procedural history. The Court has noted that it is ill-equipped to proceed on a case-by-case basis. *Farmer v. Carpenters,* 430 U.S. 290 (1977). For the same reasons, each such decision has extremely limited application. This Court's scarce resources are better allocated elsewhere.

CONCLUSION

We respectfully request the Court to deny the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

(REPRINTED FROM PETITIONER'S BRIEF TO THE EIGHTH CIRCUIT, AS APPELLANT)

STATEMENT OF ISSUES

I. THE DISTRICT COURT ERRED IN REFUSING TO FOLLOW AND APPLY THE "LAW OF THE CASE", ESTABLISHED BY DISTRICT JUDGE COLLINSON'S ORDER OF NOVEMBER 27, 1979, WHICH HELD THAT IF THE BANKRUPT WAS INSOLVENT ON MAY 9, 1977, OR WAS OTHERWISE IN DEFAULT ON CERTAIN CONTRACTUAL OBLIGATIONS, THEN THE TRUSTEE'S CLAIM FOR RESCISSION MUST BE DENIED, IN THAT (A) THE SCOPE OF THE REMAND PROCEEDINGS WAS EXPRESSLY LIMITED BY JUDGE COLLINSON'S ORDER AND (B) JUDGE COLLINSON'S ORDER, BY IMPLICATION, DISPOSED OF THE TRUSTEE'S DEFENSE OF WAIVER AND ESTOPPEL.

German v. Universal Oil Products Company, 77 F.2d 70 (ith [sic] Cir. 1935)

Plattner Implement Co. v. International Harvester Company of America, 113 F. 376 (8th Cir. .....)

Poletti v. C.I.R., 351 F.2d 345 (8th Cir. 1965)

Thornton v. Carter, 109 F.2d 316, 320 (8th Cir. 1940)

II. NOTWITHSTANDING ASSIGNMENT I ABOVE, THE DISTRICT COURT ERRED IN FINDING THAT THE APPELLANTS HAD WAIVED THEIR RIGHT TO DECLARE A FORFEITURE ON ANY GROUND OTHER THAN FAILURE OF THE BANKRUPT TO MAKE NOTE PAYMENTS, BECAUSE APPELLANTS PLED AND PROVED THAT DEFAULT AND FORFEITURE WAS INVOKED UPON GROUNDS OTHER THAN NON-PAYMENT.

Gottlieb v. Hyken, 448 SW2d 617 (Mo. 1970)

Kind v. Staton, 409 SW2d 253, 257 (K.C.App. 1966)

Miravelle Supply Co. v. El Campo Rice Milling Co., 181 F.2d 679, 685 (8th Cir. 1950) *cert. denied* 71 S.Ct. 56, 340 U.S. 822, 95 L.Ed. 604

North Star Apartments v. Goppert Bank & Trust Co., 657 SW2d 253 (Mo.App., W.D. 1983)

III. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER AND FIND THAT THE BANKRUPT WAS OTHERWISE IN DEFAULT OF ITS OBLIGATIONS UNDER THE SUBJECT SECURITY AGREEMENTS ON OR BEFORE MAY 9, 1977.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS HAD MATERIALLY BREACHED THE SUBJECT CONTRACTS, AND WERE THEREBY PRECLUDED FROM DECLARING THE BANKRUPT TO BE IN DEFAULT, BECAUSE (1) THE BREACH ALLUDED TO WAS NOT MATERIAL SO AS TO JUSTIFY THE REMEDY OF RESCISSION AND RESTITUTION; AND (2) ANY SUCH BREACH WAS WAIVED BY THE BANKRUPT AND, THEREFORE, BY THE TRUSTEE.

Long v. Huffman, 557 SW2d 911, 915 (Mo.App., K.C.D. 1977)

Mills v. Keasler, 395 SW2d 111, 116 (Mo. 1965)

Pasquel v. Owens, 186 F.2d 263, 270 (8th Cir. 1950)

Western Casualty & Surety Company v. Herman, 318 F.2d 50, 55 (8th Cir. 1963)

V. THE DISTRICT COURT ERRED IN FINDING THAT THE BANKRUPTCY COURT PROPERLY ASSERTED JURISDICTION OVER THESE PROCEEDINGS, AFTER REMAND, BECAUSE THE SUPREME COURT, IN THE CASE OF NORTHERN PIPELINE CONSTRUCTION CO. VS. MARATHON PIPELINE COMPANY, 458 U.S. 50, 73 L.Ed. 2d 598, 102 S.Ct. 2858 (1982), HELD THAT A BANKPUPTCY COURT'S EXERCISE OF JURISDICTION VIOLATED ARTICLE III OF THE UNITED STATES CONSTITUTION ON THE GROUNDS THAT THE BANKRUPTCY ACT OF 1978 UNCONSTITUTIONALLY CONFERRED ARTICLE III JUDICIAL POWER UPON JUDGES WHO LACKED LIFE TENURE AND PROTECTION AGAINST SALARY DIMINUTION AND THEREFORE, BANKRUPTCY JUDGE PELOFSKY HAD NO AUTHORITY TO EXERCISE JURISDICTION IN THESE PROCEEDINGS AFTER REMAND.

Matter of Blum, 49 B.R. 422 (U.S.B.C., W.D.Mo. 1985)

Northern Pipeline Construction Co. vs. Marathon Pipeline Company, 458 U.S. 50, 73 L.Ed.2d 598, 102 S.Ct. 2858 (1982)

U.S. Constitution, Article III

VI. JUDGE CLARK ERRED IN SUSTAINING JUDGE PELOFSKY'S FINDING REGARDING THE AMOUNT OF DAMAGES IN RESTITUTION, WHICH APPELLANTS WERE ORDERED TO PAY TO THE TRUSTEE, BECAUSE (1) JUDGE COLLINSON VACATED JUDGE JONES' RULING IN THIS REGARD, AND (2) THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE AMOUNT OF DAMAGES AWARDED IN RESTITUTION.

(Filed June 3, 1977)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

In the Matter of	)	
PROGRESSIVE FARMERS	)	
ASSOCIATION,	)	
Bankrupt,	)	
SOUTH CENTRAL ENTERPRISES,	)	
INC., EDWIN M. LIPSCOMB	)	
FARMS, INC. AND CALEB	)	In Bankruptcy
LIPSCOMB AND ELLEN	)	No. 77-30153-B-S
LIPSCOMB	)	
Plaintiffs and Petitioners,	)	
vs.	)	
RICHARD FARRINGTON,	)	
RECEIVER IN BANKRUPTCY,	)	
Defendant.	)	

AMENDED COMPLAINT AND PETITION FOR RECLAMATION OF PROPERTY

To The Honorable Jack C. Jones
Bankruptcy Judge

COUNT I

For Count I the Petitioners respectfully state:

1. That on May 13, 1977, the above bankrupt filed a Petition in this court praying that it be adjudged a bankrupt and it was on that date duly adjudged a bankrupt.

2. That Richard Farrington was appointed receiver and qualified and is acting as receiver.

3. That said bankrupt and said receiver at the time of filing of said Petition in bankruptcy claimed possession of certain real property and assets to which South Central Enterprises, Inc. and Caleb and Ellen Lipscomb, your Petitioners herein are entitled, pursuant to promissory notes and Security Agreements and Financing Statements previously executed and perfected prior to the filing of said Petition in Bankruptcy.

4. That on May 9, 1977 your Petitioners took possession of said property and assets by reason of default in said promissory notes and that these Petitioners have at all times since May 9, 1977 claimed possession of said assets but that said bankrupt and said Receiver have disputed said possession and your Petitioners' right to said possession and that pursuant to order of this Court, since May 13, 1977 Caleb Lipscomb has operated the business known as Aggieville, of which said assets are the major part [illegible] direction of said receiver.

5. That there is attached hereto and made a part hereof eight promissory notes signed by said bankrupt and marked Exhibits A, B, C, D, E, F, G and H and that there is due on said promissory notes $352,119.19, $243,253.84, $45,500.00, $156,497.41, $195,621.79, $48,371.10, $137,687.24 and $55,500.00, respectively.

6. That pursuant to security agreements and Financing Statements attached hereto and made a part hereof and marked Exhibits I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W and by reason of default in said promissory notes, the Petitioners are entitled to immediate possession of the following property: All inventory, merchandise, stock and trade, accounts receivable, equipment, furniture and fixtures located at or a part

of the business and property known as 1350 St. Louis Street, Springfield, Missouri and contract rights and books and records and working papers which said bankrupt purchased from Petitioners, together with all proceeds and products of the said collateral and the vehicles listed in the schedule attached to Exhibit T herein.

7. That said property and assets are not worth the amount due to Petitioners on said promissory notes and that said property and assets have a value of less than that sum and should be turned over and surrendered to Petitioners by order of this Court.

WHEREFORE, your Petitioners pray the Court that the said Receiver be directed to surrender and deliver to Petitioners all of said goods, property and assets aforesaid and for such other and further relief as to which Petitioners may be entitled and as to the Court seem just and proper.

COUNT II

For Count II your Petitioners respectfully state:

1. Incorporates by reference and makes a part hereof paragraphs 1 thru 5 of Count I above.

2. That pursuant to the said security agreement and Financing Statements attached hereto and by reason of default on said promissory notes the Petitioners are entitled to the immediate possession of the following property: All inventory, merchandise, stock and trade, accounts receivable, equipment, furniture and fixtures, located at or a part of the business and the real property known as 601 and 701 Front Street, Monett, Missouri and contract rights and books and records and working

papers which [illegible] bankrupt purchased from your Petitioners

NOTICE

TO: Progressive Farmers Association

Notice is hereby given that by reason of the default in payments under the promissory notes held by the undersigned, that the undersigned do hereby elect to accelerate and make all payments due under said notes immediately due and payable and do hereby demand payment in full of the maker Progressive Farmers Association on each and every such note. (emphasis supplied)

Dated this 9 day of May, 1977 at 5 o'clock P.M.

Edwin M. Lipscomb Farms, Inc.
By /s/ (Illegible)
President
South Central Enterprises, Inc.
By /s/ (Illegible)
/s/ (Illegible)
Caleb & Ellen Lipscomb